UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MDG INTERNATIONAL, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:07-cv-01096-SEB-TAB
	)	
AUSTRALIAN GOLD, INC.,	)	
	)	
Defendant.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION OF DEFENDANT AUSTRALIAN GOLD'S MOTION TO DISMISS CONSTRUCTIVE FRAUD CLAIM

Defendant Australian Gold has filed a Motion to Dismiss Plaintiff MDG International, Inc.'s ("MDG") constructive fraud claim. Australian Gold argues that MDG failed to plead its claim of constructive fraud with particularity. Specifically, Australian Gold claims that MDG failed to properly allege that a "special relationship" exists between Australian Gold and MDG. Because MDG's Complaint included sufficient allegations of such a relationship, Defendant's motion should be denied.

I. Relevant Allegations Included in Complaint.

On August 28, 2007, MDG filed its Complaint and Demand for Jury Trial including Count II for Constructive Fraud. In its Motion to Dismiss, Australian Gold chose to quote only the part thereof establishing a manufacturer/distributor relationship. In addition to the allegations quoted by Australian Gold in its Motion to Dismiss, MDG's Complaint also includes the following allegations related to its constructive fraud claim:

> 19. MDG has received questions and concerns from health agency officials and customers concerning the meaning of numbers and letters that appeared on Australian Gold bottles. Specifically, MDG was questioned as to whether Australian Gold product packaging or labeling included an expiration date.

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> 20. On June 23, 1997, Australian Gold provided MDG with written confirmation that Australian Gold tanning products do not have a listed expiration date on the bottles.
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> 21. On March 7, 2002, and June 18, 2002, Australian Gold provided MDG further written confirmation that the letters "EXP" that appear on Australian Gold products did not apply to the expiration date of the products but applied to the production date of the product.
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> 22. On September 18, 2002, Australian Gold provided MDG written confirmation that the combination of numbers and letters that appear on the back of the Australian Gold products are not related to the expiration dates of the products.
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> 26. Certain of these were Products on which Australian Gold had omitted the letters "EXP" and date information in the shipping information sent to MDG.
>
> 97. Australian Gold, as manufacturer, owes a duty to MDG, its distributor.
>
> 98. Australian Gold has violated this duty by making material misrepresentations of fact concerning the expiration date of Australian Gold products.
>
> 99. MDG reasonably relied on Australian Gold's statements to its detriment.

The written correspondence referenced in paragraphs 20-22 of the Complaint is attached as Exhibits 3-6 to the Complaint.

II. Applicable Legal Standard

Federal Rule of Civil Procedure 9(b) states that when pleading fraud, the circumstances constituting fraud must be plead with particularity. Fed. R. Civ. P. 9. "The circumstances of fraud or mistake 'include the identity of the person who made the misrepresentations, the time, place and content of the misrepresentation, and the method by which the misrepresentations was communicated to the plaintiff.'" *F. McConnell & Sons, Inc. v. Target Data Sys*., 84 F. Supp. 2d 980, 983 (N. D. Ind. Feb. 9, 2000)(*quoting*

General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1078 (7th Cir. 1999). *See also Response Acquisition, LLC v. United States Steel Corp.*, 2007 U.S. Dist. LEXIS 12402 (N.D. Ind. Feb. 21, 2007).

"Constructive fraud arises by operation of law when there is a course of conduct which, if sanctioned by law, would secure an unconscionable advantage, irrespective of the actual intent to defraud." *Paramo v. Edwards*, 563 N.E.2d 595, 598 (Ind. 1990). The elements of constructive fraud include: the existence of a duty by virtue of a special relationship between the parties; deceptive and material representations or omissions made in violation of that duty; and reliance on the deceptive statements or omissions resulting in injury to the complaining party and an unconscionable advantage to the defrauding party. *Mudd v. Ford Motor Co*., 178 Fed. App'x. 545, 547 (7th Cir. 2006). "In constructive fraud, the law infers fraud from the relationship of the parties and the circumstances which surround them." *Comfax. Corp. v. North Am. Van Lines*, 587 N.E.2d 118 (Ind. Ct. App. 1992).

The relationships necessary to impose a duty under constructive fraud law require either a close personal relationship or a legal relationship in which trust is exchanged. *Duncan v. Paragon*, 2001 U.S. Dist. LEXIS 18181, *12 (S.D. Ind. Sep. 6, 2001)(Tinder, J.). Indiana courts have long recognized that a "special relationship" may arise out of a buyer-seller relationship where one party possesses knowledge not possessed by the other or out of a course of dealing in which the party with knowledge provides information and the other party relies on it. *Mudd*, at 547; *see also Wells v. Stone City Bank*, 691 N.E.2d 1246, 1251 (Ind. Ct. App. 1998); *Mullen v. Cogdell*, 643 N.E.2d 390, 401 (Ind. Ct. App. 1995); *A.I. Credit Corp. v. Legion Ins. Co*., 265 F.3d 630, 635-36 (7th Cir.

2001); *Kirkpatrick v. Reeves*, 121 Ind. 280 (1889); *Reginald Martin Agency v. Conseco*, 478 F. Supp. 2d 1076, 1091 (S.D. Ind. 2007)(Baker, J.). Here Australian Gold, the manufacturer, knew what it made, how it was made, and whether and when its products "expired." MDG relied on this knowledge and on what it was told by Australian Gold. Complaint, ¶ 99.

While sellers generally do not have a duty to disclose material facts, they do if a special relationship exists that imposes a duty of disclosure. *Fimbel v. DeClark*, 695 N.E.2d 125, 127 (Ind. Ct. App. 1998). "Courts have found such a relationship, and therefore a duty to disclose, where the buyer makes inquiries about a condition on, the qualities of, or the characteristics of the property. When the buyer makes such inquiries, it become incumbent upon the seller to fully declare any and all problems associated with the subject of the inquiry." *Id*. "The law recognizes that in a buyer-seller relationship one party may be in the unique possession of knowledge not possessed by the other and may thereby enjoy a position of superiority over the other. The relationship is therefore one which invokes a duty of good faith and fair dealing." *Mullen* at 401. That is what MDG claims as to Australian Gold.

"The types of statements that give rise to constructive fraud generally are misrepresentations or omissions of objective fact and occur during the business transaction rather than after it." *Mudd* at 547. This is alleged in paragraphs 98 and 99 of the Complaint.

Ultimately, the question of whether a special relationship exists is a question of fact. *F. McConnell* at 986. The party pleading constructive fraud is "entitled to all inferences and dismissal is inappropriate unless there are no set of facts which would support its claim." *Id.* Here, such facts are alleged and supported by Exhibits 3-6 attached to the Complaint.

III. MDG properly pled allegations established a special relationship between Australian Gold and MDG.

Australian Gold argues that the only allegation included in MDG's Complaint concerning the relationship between Australian Gold and MDG is that "Australian Gold, as manufacturer, owes a duty to MDG, its distributor." This argument focuses solely on the "label" of manufacturer/distributor and ignores the remaining allegations concerning the actual relationship and course of dealing between Australian Gold and MDG. [1]

Contrary to Australian Gold's arguments, the relationship between Australian Gold and MDG, as alleged and supported by the exhibits signed by Australian Gold, is a special relationship giving rise to a duty.

As manufacturer and seller, Australian Gold is in the position of having knowledge about its products that others do not. Australian Gold knows precisely what

[1] In support of its motion, Australian Gold cites four cases. Each of these cases states the basic elements necessary for a constructive fraud claim; however, they otherwise bear no substantive similarity to the case at hand. The court in *Comfax Corp. v. North Am. Van Lines*, 587 N.E.2d 118, 126 (Ind. Ct. App. 1992), directly recognized the rule that MDG argues is applicable here: that a special relationship can exist between a buyer and seller. In *Concordia v. Hendry*, 2005 U.S. Dist. LEXIS 28528, *8-11 (N.D. Ind. Nov.9, 2005), the court held that a prospective employee had no duty of disclosure and that through reasonable inquiry the employer could have discovered the information on its own. *Id.* at *10. In the present case, Indiana courts have held that the buyer/seller relationship can create a duty and MDG specifically sought information about Australian Gold products from the entity that had access to the information—Australian Gold. Next, *Olcott Int'l & Co. v. Micro Data Base, Sys.*, 793 N.E.2d 1063 (Ind. Ct. App. 2003), is first and foremost a case about whether the applicable statute of limitations was tolled. Second, the parties in *Olcott* were involved in an arm's length relationship where there was no disparity in power or influence. *Id.* at 1073. In the present case, there is an undeniable disparity of information because Australian Gold had access to information that MDG did not and took affirmative steps to provide MDG with this information. Finally, Australian Gold cites *F.McConnell & Sons v. Target*, 84 F.Supp. 2d 980 (S.D. Ind. 2000), for the proposition that a constructive fraud claim could be dismissed under Rule 9(b) for failure to plead a special relationship. (D's Brief, p. 3). To the contrary, *F. McConnell* never reached this conclusion and ruled on other grounds. In a footnote, the court stated that while "the constructive fraud claim could conceivably be dismissed for the failure to comply with the particularity requirement of Rule 9(b) "a definitive resolution was not necessary because other requirements were not met. *Id.* at 986. Further, in the text of its opinion, the court stated that whether a special relationship exists is "essentially a question of fact." *Id.*

ingredients are used in its products, it knows the meaning of the numbers and letters that it places on its products, and it knows if and when Australian Gold products expire. As distributor and buyer, MDG inquired about this information. As held in *Mullen*, Australian Gold's access to this information, when MDG lacks it, invokes a duty of good faith and fair dealing.

Australian Gold and MDG have participated in an ongoing buyer/seller relationship since 1994. During this time, MDG received multiple inquires regarding the information appearing on Australian Gold bottles and the expiration dates of Australian Gold products. MDG sought answers from Australian Gold, the manufacturer of the products and the obvious entity with access to the requested information. Precisely in line with the standard expressed in *Fimbel*, MDG inquired about the qualities or characteristics of the items it was purchasing from Australian Gold. As referenced in and attached to the Complaint, Australian Gold provided MDG letters that explained the labels that appeared on Australian Gold products and clarified expiration questions as to Australian Gold products.[2] The fact that Australian Gold responded at all to MDG's repeated inquiries is acknowledgement that it possessed knowledge that MDG did not. Further, Australian Gold knew that MDG was relying on this information and providing these letters to third parties. This is evidenced by the fact that several of the letters provided are addressed to "To whom it may concern."

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[2] Australian Gold has filed a Motion to Dismiss with regard to MDG's claim for constructive fraud, and not MDG's claim for actual fraud. The element of intent to deceive distinguishes these two types of fraud. *Coffey v. Wininger*, 156 Ind. App. 233, 239 (Ind. Ct. App. 1973). Australian Gold may or may not admit that it was aware of the misrepresentations included in Exhibits 3-6 attached to the Complaint; however, MDG had reason to rely, and in fact did rely, on the contents of these letters.

The fact that MDG sought this information from Australian Gold and that Australian Gold provided letters specifically intended for distribution to third parties is evidence of the special relationship that existed between Australian Gold and MDG. The allegations related to this request and provision of information between Australian Gold and MDG are ample claims of the type of special relationship necessary to plead constructive fraud.

Through the allegations stated in the Complaint and the exhibits attached to the Complaint, MDG has fulfilled the requirements of pleading constructive fraud. MDG has not only identified and described the misrepresentations, but it has attached letters containing the misrepresentations to the Complaint and shown the type of relationship required. The allegations and exhibits of the Complaint fully comply with the mandate of Federal Rule of Civil Procedure 9.

IV. Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss Plaintiff's Constructive Fraud claim should be denied in full.

Respectfully submitted:

/s/ Edward O. DeLaney__________
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically on November 5, 2007. Notice of this filing will be sent to the following parties by operation of the Courts electronic filing system. Parties may access this filing through the Court's system:

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